No. 3659

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLLIE N. McNAUGHT,
Plaintiff in Error,

vs.

SADIE HOFFMAN,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA.

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BRIEF AND ARGUMENT.

I.

The discussion revolves around the main question, does the complaint state a cause of action in favor of the plaintiff and against the defendant? The plaintiff in error has taken the position that the memorandum, held by the Montana Supreme Court in Smith vs. Hoffman, 56 Mont., 315, to be a condition subsequent annexed to the deed from Mrs. Smith to Mrs. Hoffman, should be construed as a trust. Her principal argument seems to be addressed to this contention. It is also suggested that the writings may be regarded as a gift, a contract made for the benefit of a third person, or a conveyance on conditions subsequent, as was held by the Montana Court, supra.

THEORY UPON WHICH CASE PRESENTED.

At the outset we respectfully submit that the character of the instruments and of the transaction were fully discussed to and determined by the Supreme Court of Montana in Smith vs. Hoffman, supra. Learned counsel for plaintiff in error made to the Montana Court essentially the same contentions as are made herein, with special stress being laid upon the argument that the memorandum in question operated as a condition subsequent; thus, we quote from the resume of the brief of counsel for the appellant

in that case as it is found preceding the opinion in Smith vs. Hoffman, supra:

First: "By the two instruments, a transfer upon condition precedent was effected, the condition being the continued payments of $50.00 per month for an unlimited time, that is, for a length of time without restrictions or bounds," etc. * * *

Second: "If the result reached in the construction of this transaction is adverse to its being a conveyance on condition precedent, the query then arises whether the continued payment of $50.00 per month is not a condition subsequent, within the meaning of Section 4902 Revised Codes", etc. * * *

Third: "By the two papers an implied trust was created".

MONTANA DECISION CONTROLLING.

We contend that the construction of the two instruments by the Supreme Court of Montana is not only correct but may reasonably be said to be res adjudicata. This matter would seem to be placed beyond controversy by what is said in subdivision II, page 9 of the brief of plaintiff in error as follows:

"The plaintiff in error was not made a party to said action but we do not think it out of place to advert to the fact that there was an express finding of fact therein that

she knew of and consented to the bringing and maintenance of said action".

We are equally confident that it is not out of place for us to mention the fact that this was also conceded at the trial in the local State District Court in the case of Smith vs: Hoffman, supra. But we further submit that the decision in the case of Smith vs. Hoffman is one establishing a rule of local law with regard to real property, and that the construction of the instrument will be followed by this Honorable Court. The rule is laid down succinctly in:

27 R. C. L., page 51 Section 57.

In any event if the "decisions are not controlling, they are persuasive and will receive attention and respect".—27. R. C. L. page 53—Section 58.

Also as authority on this point see:

Guernsey vs. Imperial Bank, 188 Fed. 300, 119 C. C. A. 278, 40 L. R. A. (N. S.) 377; Newbern vs. National Bank, 234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917 B, 1019; Swift vs. Tyson 16 Pet. 1, 10, U. S. (L. Ed.) 865.

That a rule of property was laid down and local statutes construed cannot be denied.

The Supreme Court in the Smith-Hoffman controversy applying the provisions of Section 4623 Revised Codes of Montana reading as follaws:

"When a grant is made upon condition

> subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must re-convey the property to the grantor or his successors by grant, duly acknowledged for record,"

said:

> "Under all the circumstances and the weight of authority, we deem the deed to have been made upon a condition subsequent imposed by the memorandum and contract, and that upon a breach of such condition the plaintiff would become entitled to a rescission or cancellation, unless there was a waiver of the condition",

It was held that there had been a waiver of the condition. The point we wish to make is that the Court determined as a rule of property that a deed with a defeasance of this general character constituted a deed with a condition subsequent appended thereto, and that rule of property is now res adjudicata.

The transaction, therefore, upon which the plaintiff now relies in the pending case, was, according to the intention and understanding of Mrs. Smith, the grantor, as evidenced by the position taken by her in her own action against the defendant in error, a conveyance upon condition vitiating the grant for non-performance; and, as determined by the State Court, a conveyance upon condition subsequent, terminat-

ing the estate granted, upon its breach, which would have entitled the grantor to a rescission of the contract and a cancellation of the deed, if performance had not been waived. Whether Mrs. Smith was also precluded from recovering damages, by the defendant's failure to make the payments in question, was not a matter to be passed upon in that case. Whatever benefits therefore, the memorandum contract conferred upon Mrs. McNaught, were taken subject to the right of Mrs. Hoffman, the defendant in error here, to relieve herself of the obligations which the conditions of the memorandum contract imposed, if, under the terms of that instrument, the exercise of that right was left open and available to her. And the fact that Mrs. Smith, the party to the contract who would have been entitled to avail herself of the remedies which a breach of the conditions conferred has estopped herself from enforcing the penalties of the breach, does not change or affect the legal relations between the plaintiff and the defendant in the case at bar.

II.

In the brief submitted by the learned counsel for the plaintiff, he invokes, as determinative here, the law laid down by the Supreme Court of the State in Smith vs. Hoffman, stating that, while the present plaintiff was not in express terms a party to that action, "there was an express finding of fact therein that she knew of

and consented to the bringing and maintenance of said action".

III.

NO CONTRACTUAL DUTIES IMPOSED BY MEMORANDUM.

The memorandum contract imposes no contractual duties or obligations upon anyone. The only terms of a contractual nature are those defining the estate intended to be granted by the fee simple deed from Mrs. Smith to Mrs. Hoffman, to-wit: a life estate; and those imposing the conditions upon which the continuing existence of that life estate should depend, to-wit: the grantee's remaining single and the payment of $50 per month to Mrs. McNaught. Upon a compliance with these conditions, "the deed," in the words of the memorandum contract, "then will stand good" until the grantee's death. It was optional with Mrs. Hoffman to comply, or not to comply, with the conditions imposed, as she might choose or see fit, the failure to comply with either one of the conditions resulting merely in the forfeiture and termination of the life estate. She did not agree or bind herself to keep up these payments indefinitely, any more than that she would remain single the remainder of her life: all that she did agree to was that the estate granted by the fee the simple deed should only be a life estate and that the life estate should come to an end in the event of her failure to abide or com-

be cleared up by pleading
13 C. J. 716.

ply with either one of the conditions of the memorandum contract.

NOT A TRUST.

Hence, aside from the fact that this is not a suit in equity for the establishment and enforcement of a trust, but a common-law action upon an alleged contractual obligation for the payment of money, no trust was created as was suggested. For, as stated by the New York Court of Appeals, in Holland vs. Alcock, 2 Am. St. Rep., on pages 427 to 428:

> "This equitable title cannot on any sound principle be made to depend upon the exercise by the trustee of an election whether he will or will not execute the alleged trust. **In such a case there is no trust in the sense in which the term is used in jurisprudence.** There is simply an honorary and imperfect obligation to carry out the wishes of the donor which the alleged trustee cannot be compelled to perform, and which he has no right to perform contrary to the wishes of those legally or equitably entitled to the property, or who have succeeded to the title of the original donor. The existence of a valid trust capable of enforcement is consequently essential to enable one claiming to hold as trustee to withhold the property from the legal representatives of the alleged donor. A merely nominal trust, in the perform-

ance of which no ascertainable person has any interest, **and which is to be performed or not as the person to whom the money is given thinks fit, has never been held to be sufficient for that purpose".**

To the same effect:

24 Ruling Case Law, "Trusts" Par. 20, p. 1184.

See, also:

Mantel vs. White, 47 Mont. 234, 132 Pac. 22.

And in Birdsall vs. Grant, 57 N. Y. S. 705, it was held that a deed conveying the property, subject to the condition of paying the income and profits thereof to the grantee's son during his natural life,

"does not create a trust, but conveys on a condition subsequent, which may be waived by the person entitled to enforce it".

"A trust of this class cannot be established by a transaction which merely creates an equitable lien, mortgage, or other security, or an executory contract to sell or convey. **Neither is a trust created by the fact that part or all of the consideration for an absolute conveyance is a promise by the grantee to pay a certain sum of money to a third person."**

39 Cyc. 65.

The complaint fails to state facts sufficient

to constitute a cause of action, based on any such theory.

One of the allegations of the complaint is: "and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by said defendant than the carrying out and fulfilment of the conditions of such agreement or contract". (Tr. p. 3.)

In Riddle vs. Beattie, 77 Iowa, 168, 41 N. W. 606, when a deed was made in consideration of support of the grantor the court held that no trust arose. The Court said in part:

> "There is no question of trust in the case. The facts alleged in the petition do not establish a trust, arising either between plaintiff and Townsend, or plaintiff and Townsend and defendant. The petition shows that Townsend undertook to support plaintiff, and, in consideration of such agreement, the land was conveyed to him. There is not a word in the petition showing a trust arising in the transaction."

The complaint in this case is not so framed as to support any such theory. It is clear that the memorandum does not create a trust. Neither the property conveyed, nor any specified income therefrom is to be devoted to the support of Mrs. McNaught; nor is there any requirement to account.

Brown vs. Carter, 15 S. E. 935;

Stanley vs. Cobb, 5 Wall, 119, 165, 18 L.

Ed. 502, 509;

Spiers vs. Roberts, 73 Mich. 666, 41 N. W. 841.

ANY TRUST WOULD BE BARRED BY STATUTE OF LIMITATIONS.

If the transaction could be construed to be a trust at all, an action to establish and enforce it would be barred by the statute of limitations. Section 6451 R. C. (518 Code Civ. Proc.) reads as follows:

> An action for relief not hereinbefore provided for, must be commenced within five years after the cause of action shall have accrued".

In Mantell vs. Speculator Mining Co., 27 Mont. 473, it was said:

> "In Lux vs. Haggin, 69 Cal. 255, 10 Pac. 674, the court said: 'It has been repeatedly decided in this state that Section 343 of the Code of Civil Procedure, 'An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued', applies as well to suits in equity as to actions at law'. It will be observed that Section 343 of the California Code of Civil Procedure is, in substance, identical with Section 47 of the Compiled Statutes of 1887 and Section 518 of our Code of Civil Procedure. * * * Under the allegations of the complaint, then, the statute

commenced to run against plaintiff's cause of action in 1893; and, unless the running of the statute was interrupted or suspended, this cause of action, as disclosed by the complaint filed herein, was barred long prior to the date of the commencement of this action, whether Section 47 of the Compiled Statutes, or Section 518 of the Code of Civil Procedude, be applicable in this instance".

See, also:

Boydstun vs. Jacobs, (Nev.) 147 Pac. 447;
Philippi vs. Philippi, 115 U. S. 157, 29 L. ed. 336.

IV.

NOT A GIFT, NOR CONTRACT FOR BENEFIT OF THIRD PERSON.

The requirement of the monthly payments provided for in the memorandum contract being a conditional one, compliance being optional with the defendant, and performance being executory and in **futuro,** there was neither a gift of the money which would have been realized by Mrs. McNaught if the payments had been made, nor was there a contract giving rise to a cause of action in the plaintiff's favor under the provisions of Section 4970 of the Revised Codes, conferring upon a stranger to the contract the right to enforce it when expressly made for his benefit. Section 4970, R. C. provides:

> "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it".

Whatever the rule may be that has been applied to cases of this kind by the courts of other jurisdictions, it is settled law in this State that there is no such right entitling the third party to sue, unless there was, as between the parties to the contract, a legal obligation or duty owing from the promise (in this case Mrs. Smith) to the beneficiary (Mrs. McNaught), which the promissor has promised and undertaken to pay or discharge. This is the New York rule. It was adopted and applied by the Supreme Court of this State in McDonald vs. American Nat'l Bank, 25 Mont. 456, and again in Tatem vs. Eglanol Mining Co., 45 Mont. 367. In the former case, the Court, on pages 494 to 495 of the opinion, said:

> "In so far as they are applicable to the facts of the case at bar, the fundamental principles in the light of which Section 2103 **supra,** should be interpreted may be thus illustrated: An executed contract does not require a consideration to support it. For example, a gift consummated is an executed contract. But a contract of gift the subject of which is not delivered is without consideration—a mere nudum pactum—and therefore not enforceable

by the donee. The provisions of section 2103 do not embrace gifts not perfected or other executory contracts lacking consideration. It should seem to be manifest that the legislature **did not intend to declare that an executory contract in which there is a promise to make a gift or to confer a gratuity upon a third person may be enforced by him.** To come within the meaning and scope of the section, the (executory) contract made expressly for the benefit **of a third person must be one whereby the promissor undertakes to pay or discharge some debt or duty which the promisee owes to the third person,—in other words, the third person must sustain such a relation to the contracting parties that a consideration may be deemed to have passed from him to the promissee which raises the implication of a promise from the promisor directly to himself. There must be a consideration passing from the third person by virtue of which he may assert the existence of a promise in his favor."**

In Vrooman vs. Turner, 69 N. Y. 280, 25 Am. Rep. 195, on page 198, the New York rule was stated in these words:

"The courts are not inclined to extend the doctrine of Lawrence vs. Fox to cases not clearly within the principle of the de-

cision. Judges have differed as to the principle upon which Lawrence vs. Fox and kindred cases rest, but in every case in which an action has been sustained **there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise.** Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who, by bringing his action, adopts his acts, or upon the doctrine of trust, the promisor being regarded as having received money or other thing for the third party, is not material. **In either case there must be a legal right,** founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." (Italics ours.)

The rule was applied in:

Constable vs. National Steamship Co., 154 U. S. 51, 38 L. ed. 903;

Lorillard vs. Clyde, (N. Y.) 25 N. E. 917, 10 L. R. A. 113;

Dunham vs. [illegible] (N. Y.) [illegible]

Elliot on Contracts, Vol. II,
Sec. 1413; Jefferson v. Asch,
25 L. R. A. 257.

And, see:

6 Ruling Case law, "Contract". Par. 275, on page 888.

V.

If we assume this to be a contract made for the benefit of Mrs. McNaught, she was required to take it just as it was made, and subject to all defenses that could be made against a direct party. The rule is well stated in 13 C. J. 699, Sec. 799, which reads in part:

> "One who seeks to take advantage of a contract made for his benefit by another must take it subject to all legal defenses".

In the case of Clay vs. Woodram, 45 Kan. 123; 25 Pac. 621, the Court held:

> "It is well settled in this state that, where one person agrees with another to do some act for the benefit of a third person, such third person, though not a party to the promise, may maintain an action against the first party for a breach of the agreement. Manufacturing Co. vs. Burrows, 40 Kan. 361; 19 Pac. 809; Mumper vs. Kelley, 43 Kan. 256; 23 Pac. 558; **The third party, however, who avails himself of such a contract, and claims under its provisions, is subject to the defenses arising out of the contract between the original parties."**

See, also, Hume vs. Atkinson, 54 Pac. 15.

ACTION ON CONTRACT BARRED.

We submit to the Court that if the action is based upon the theory of a promise made for the benefit of the third person, the cause of action is barred by the statute of limitations. The Statute of limitations applicable in Montana would be Section 6445, Revised Codes, reading as follows:

"Within eight years: An action of any contract, obligation, or liability, founded upon an instrument in writing."

It can plainly be gathered that the claimed obligations as such is the basic right which would be afforded by the alleged contract as distinguished from specific payments and that the failure to assert any claim at all for a period of eight years would bar any right that existed. The last payment that was made was October 14, 1910. (Tr. p. 6, par. 4). The complaint in this case was filed June 25, 1920. (Tr. p. 30).

The contract in its nature was one within the control of the parties thereof, Mrs. Smith and Mrs. Hoffman. Plaintiff in error would be obliged to show something more in her complaint than she has averred in order to avoid the statute of limitation. She would have to show that within the period of eight years the contract was actually an existing, virile contract between the original parties.

We respectfully submit that the decision by

the learned District Judge is in every respect correct and should be affirmed.

Respectfully submitted,

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Attorneys for Defendant in Error.

"The functions of a complaint cannot be supplied by a reply" Waitev. Shumaker, 50 Mont.